NO. 13673

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANTY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al,

Appellees.

Brief of Appellee Hawaiian Pineapple Company, Ltd.

On Appeals from the United States District Court for the District of Oregon

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KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
916 Portland Trust Building
Portland 4, Oregon
Attorneys for Appellee
Hawaiian Pineapple Company, Ltd.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-53

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JURISDICTIONAL STATEMENT

For a statement of the pleadings and facts disclosing the basis upon which the District Court had jurisdiction, we refer the Court to the jurisdictional statement in the

opening Brief (pp. 1-5) of the Hawaiian Pineapple Company, Ltd. (hereinafter referred to as "Hapco") on our cross-appeal herein.

The assertion in appellants' brief that they "do not concede" (Br. 4) the jurisdiction of the District Court disregards the facts that valid jurisdiction was obtained over the persons of International and Local 8, and that valid jurisdiction over the subject matter was obtained under Sec. 303 of the Labor-Management Relations Act, 1947 (hereinafter referred to as the "Act") 61 Stat. 158, 29 U.S.C.A. (Supp. 1952), Sec. 187, by appropriate allegations that appellant labor organizations engaged in various activities affecting commerce in violation of Sec. 303 (a) (1) and 303 (a) (4) of the Act as a result of which Hapco was injured in its business and property (Tr. 57-63).

STATEMENT OF THE CASE

We are unable to accept any part of appellants' statement of the case in which they purport to summarize the evidence. We suggest to this Court that appellants' statement is inaccurate, incomplete, and highly misleading.

To avoid repetition we respectfully first refer the Court to the statement on pages 15 to 31, inclusive, of our Brief on the cross-appeal. To this statement we shall add herein the evidence relating to activities of International and Local 8, which was omitted from our previous Brief, and shall then specifically controvert appellants' statement.

A. Activities of International and Local 8

We submit that the jury would have been warranted in finding from the testimony and exhibits the facts set out hereafter.

[Commencement of Boycott]

On August 21, 1949, three days before Hapco's chartered ocean-going barge YFN with its cargo of approximately 115,000 cases of pineapple worth more than $680,000.00 left Honolulu for the San Francisco Bay area, the representative of International in Hawaii, Schmidt, cabled the Regional Director for International in Seattle, Gettings, various information concerning the barge and requested the Regional Director to ascertain if the International Longshoremen's Association in Tacoma would handle the barge there (Exhibit 1; Tr. 700, 703, 915, 918-919, 1019, 1091).[1]

No attempt was made, however, to interfere with the loading of the barge in Hawaii and prior to its departure for the mainland, there were no disturbances or labor difficulties of any kind connected with it.[2] Hapco and Isle-

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[1]The cable (Exhibit 1) read:
"HAWN PINE CO HAS SECURED NAVY BARGE YFN 624 TUG ONO OR AKI WILL TOW APPROXIMATELY 3000 TON PINEAPPLE LOADED NONUNION TEAMSTERS HAULING TO BARGE NONUNION TUG CREW NONUNION DESTINATION PROBABLY SAN JOSE CANNERY OWNED HAWN PINE RR FROM TAC ASCERTAIN IF ILA WOULD HANDLE."

[2]At the time of the loading of the barge, Hapco had a contract with an ILWU local representing cannery and plantation employees. The cases of pineapple were transported from Hapco's cannery to the terminal of Isleways, Ltd., Pier 36, Honolulu, by

ways, its wholly owned transportation subsidiary, were not engaged in any dispute with their own employees and were not parties to the labor dispute and strike between the stevedoring companies and International and its affiliated local union (Tr. 1015-1018).

The barge originally sailed for the San Francisco area, for its cargo of pineapple was being shipped to Hapco's cannery at San Jose, California and to seven or eight other canneries in the Santa Clara area (Tr. 1019, Exhibit 188). However, it proved to be impossible to make arrangements to unload the barge in the San Francisco Bay area because of the certainty that the ILWU would boycott it (Tr. 1020). Accordingly, when the barge was a day or so out of San Francisco, it was diverted to Puget Sound and the Port of Tacoma where longshore work was done by members of the International Longshoremen's Association affiliated with the American Federation of Labor (Tr. 1020-1021). The barge arrived off Tacoma on September 8.

Meanwhile, the Regional Director of International in Seattle, Gettings, had been on the lookout for the vessel and had been in touch with officials of International in San Francisco (Exhibits 2 and 5). In an interview which was later published in The Seattle Post Intelligencer, the Regional Director stated that the barge was loaded under strike conditions in the Hawaiian Islands and hence was considered "hot cargo", and he served notice on behalf

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Hapco drivers affiliated with the ILWU and by union employees, affiliated with the AF of L, of a trucking company and were loaded on board the barge by terminal employees of Isleways (Tr. 1015, 1017).

of his union that the barge would be picketed wherever she docked in the Puget Sound area (Tr. 493-495, 706, Exhibit 2). After the barge arrived in Puget Sound, the Regional Director contacted a number of other unions; the International Longshoremen's Association, the Marine Firemen and Watertenders, the Marine Cooks, and possibly the Masters, Mates & Pilots. The Regional Director admitted telling these other unions and particularly the ILA that the barge had been loaded by nonunion labor in the Hawaiian Islands and that it would be picketed if an attempt was made to unload it (Tr. 705-710).

When Hapco contacted the ILA in Tacoma to arrange for the unloading of the barge, they refused to handle the cargo (Tr. 1022-1024).

Although the Regional Director denied that the ILA had agreed that they would not unload the barge, the representative of International in Hawaii later wrote the Regional Director in Seattle that we "are grateful that the pineapple barge has not been unloaded" and that he *"hoped the ILA boys will hold fast to their word not to touch that cargo"* (Exhibit 3).

The International representative for Hawaii also advised that:

> *". . . the strike is still effective and it will remain so as long at Matson's ships are tied up there and there is no resumption of operations between here and West Coast ports".* (Exhibit 3).

Being unable to unload in Tacoma, Hapco was once again forced to seek a port where the ILWU did not operate and finally made arrangements with the Port of The

Dalles at The Dalles, Oregon, on the Columbia River, whereby the latter agreed to discharge and unload the pineapple from the barge and to load it on railroad cars and trucks for shipment to California (Tr. 474-483, 496-500, 1024). The barge, which was still in Tacoma, was directed to proceed to The Dalles, where it arrived the evening of Saturday, September 24, 1949 (Tr. 1024-1025).

When the barge left the Puget Sound area, the Northwest Regional Director of International made an intensive effort to keep track of it, stating "I will make no bones about it, that we were looking for it and watching for it. That was our job" (Tr. 735). He discussed the barge with the Secretary of the International (Tr. 733). When it was reported to him that the barge had been sighted in the Columbia River, Gettings contacted Meehan, the representative of International in Oregon (Tr. 732). Meehan later called Gettings when the barge was half way up the Columbia River to Portland and was instructed to talk to the office of International about future action (Tr. 732-734, 1359-1360). The Secretary-Treasurer of Local 8 was also contacted by Bodine, an International representative on the Coast Labor Relations Committee from International's headquarters in San Francisco, who advised him that the International would send a representative to The Dalles to picket the barge and requested Local 8 to furnish an automobile and "a few persons" to help distribute and prepare the "necessary literature that goes along with such a picket line" (Exhibit 185; Tr. 817, 1300-1301).[3]

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[3]The teletype in question from Bodine which was sent after the riot (Exhibit 185) also states that he advised the Secretary-Treasurer of Local 8 at the time that the matter "was of very little

[Boycott at The Dalles]

On September 23, a day before the arrival of the barge, Meehan, the representative of International in Oregon, went to The Dalles to meet with the Commissioners of the Port of The Dalles. He admitted that he was not representing Local 8 in so doing (Tr. 1254, 1348). Meehan's position was that the barge was "hot cargo" loaded by "unfair labor", that Hapco was trying to break the strike in the Hawaiian Islands and that he would picket the Port if any attempt was made to unload the barge. Meehan also threatened to stop railroad shipments to the Continental Grain Company, which was a lessee at the Port dock, and that any shipments from it which did get out would not be unloaded at the grain company's plant in Longview, Washington (Tr. 477-479, 500-502).

After the arrival of the barge at the Port dock on September 24 (Tr. 1025), Meehan and Baker, the President of Local 8, met with the Commissioners of the Port of The Dalles to persuade and threaten them again not to unload the barge (Tr. 480-485, 502-505). On this same day, September 26, a Hawaiian longshoreman from International's local union in Hawaii began to picket at the entrance to the Port dock in the company of various individual longshoremen from Local 8 (Tr. 52-54, 417, 506, 1254, 1315). The Hawaiian picket, according to the

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significance and should not under any circumstances warrant any difficulties". Similar assertions were repeatedly made by various International's witnesses. So the Northwest Regional Director of International testified that he was told by the Secretary of International that "it was not worth having any trouble over the barge; that it was not important enough to get into a beef over it" (Tr. 733).

Secretary-Treasurer of Local 8, "wasn't representing Local 8", which had no Hawaiians in its membership (Tr. 1317). While these longshoremen commenced to picket the dock, Meehan, assertedly at the request of Local 8, contacted various union officials of the Railroad Brotherhoods, the Teamsters, and the Inland Boatmen about observing the picket line set up at the Port dock (Tr. 780-784, 889). By Tuesday, September 27, the picket line had grown to 75 to 100 longshoremen (Tr. 584).

On Wednesday, September 28, the President of Local 8 admittedly dispatched at least 150 to 200 individual longshoremen members of Local 8 from the union hall in Portland to picket before the entrance to the Port dock (Tr. 888-890, 1275-1276). Local 8 paid for the gasoline used by these individual longshoremen in driving to The Dalles and back and also paid for their meals while they were in The Dalles (Exhibit 184; Tr. 892-894, 1256-1257).

Besides forming a mass picket line of over 200 longshoremen before the entrance to the dock (Tr. 433-434, 506, 585, Exhibits 47-66, inc.), the longshoremen passed out circulars to the citizens of The Dalles (Tr. 371-372). These circulars (Exhibits 23 and 25) were signed by "International Longshoremens and Warehousemens Union" and were a message to the people of The Dalles that the "Big Five" of Hawaii were trying to break the Hawaiian strike by unloading their "scab pineapple" in the Port of The Dalles. Meehan confirmed that he had "something" to do with the preparation of the circulars (Tr. 808).

In a press interview[4] on Wednesday, Meehan also repeated the charge that the pineapple barge was "hot cargo" and an attempt to break the Hawaiian strike (Tr. 419). The President of Local 8 had made similar charges to the press (Tr. 423); and the Hawaiian picket had advised the press that he was representing the "International Longshoremens and Warehousemens Union" (Tr. 424-425).

The record does not make exactly clear who was in charge of the massed pickets; Meehan advised the Assistant Chief of Police at The Dalles that he was in charge of the picketing (Tr. 594-595), whereas the Secretary-Treasurer of Local 8 stated that the officials of Local 8 were in charge at The Dalles (Tr. 1311-1312). Whoever was in command, the longshoremen massed before the Port entrance continued to increase in number and by noon there were over 200 of them stationed there (Tr. 433-434, 506, 585).

The riot, which was thereafter staged by this mob of longshoremen when they stormed on to the Port dock and assaulted Hapco's employees and damaged its property, has been recounted on pages 19 to 25, inclusive, of Hapco's opening Brief on the cross-appeal herein. Witnesses testified that the damage effected by rioting longshoremen was done by "team work" and that they marched off the dock in an orderly way after the riot, where the Mayor of The Dalles and another disinterested witness heard Meehan address the assembled longshoremen and tell

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[4]In this interview a few hours before the riot on the dock, Meehan told the Editor of The Dalles Optimist "that the ILWU was born in violence and had to have violence to continue to exist" (Tr. 521).

them that "they had done a fine job" (Tr. 369-370, 461, 571, 574, 580, 660).

[Post-Riot Activities]

On the day following the riot the President of Local 8 again dispatched members of his union to The Dalles, and Local 8 again paid for their gasoline and meals (Exhibit 184, Tr. 890, 1256-1257). Some 200 to 300 members of Local 8 patrolled the streets of the City of The Dalles, terrifying the people of the community (Tr. 443, 445, 457, 416-463, 1042). Again circulars were distributed over the signature of "The International Longshoremen's & Warehousemen's Union—CIO" blaming the violence of the day before at the Port dock on the Big Five companies of Hawaii and expressing regret "for the incident of yesterday, even though we feel it was not our fault. We are accustomed to having our picket lines respected" (Exhibit 24).

The riot put a stop to the unloading of the barge, and it was not until October 19 that arrangements were again made by Hapco to load cargo from the Port dock on to railroad cars and trucks (Tr. 486, 1043). In the interim, Hapco had effected repairs to its crane and trucks and had been advised by the NLRB that the unions had dropped their contention that the pineapple was "hot" (Tr. 1038, 1040, 1043).

On October 20, however, longshoremen with "ILWU" banners but from Local 8 again officially picketed at the entrance of the Port dock, bringing an end to the unloading operation and forestalling the movement of any cargo from the dock (Tr. 488, 512, 890, 1044). This picket line

was finally removed by an injunction against International and Local 8 (Tr. 489-490, 512-513, 1043-1046). By the end of October, Hapco was finally able to commence moving its cargo by truck and by rail to its San Jose, California, plant (Tr. 1046). The barge was finally completely unloaded on November 8 (Tr. 1047).

When 22 individual members of Local 8 were arrested and indicted in the Circuit Court of the State of Oregon for the County of Wasco for the crime of riot, Local 8 put up the bail money to release the indicted men and retained counsel to defend them; and when these individuals were convicted by pleading guilty, Local 8 paid their fines and also reimbursed them for the wages which each of the convicted men lost as a result of the criminal proceedings (Exhibit 184, Tr. 895, 1259-1260, 1319-1320). Harry Bridges, the President of International, testified that the ILWU also furnished money to Local 8 in connection with the defense of the indicted longshoremen (Tr. 873-874). Local 8 also received financial contributions for the expenses it incurred in picketing at The Dalles from other ILWU unions through International (Tr. 896-898, 1258-1259, 1316-1317).[5]

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[5]The Secretary-Treasurer of Local 8 teletyped Bodine at International's San Francisco office on November 8, 1949:
"WE ARE IN THE BITE PLENTY BECAUSE OF THE PINEAPPLE BARGE. WE WANT NO MORE OF IT HERE OR ANY WHERE ELSE. WUD LIKE TO HEAR AN INDICATION AT LEAST OF SOME SUPPORT FROM ILWU IN REGARD TO OUR PREDICAMENT HERE. WE ARE SICK OVER THE WHOLE DAMNED DEAL . . ." (Exhibit 185).

B. Answer to Appellants' Statement of the Case

Appellants' seven paragraph statement of the case (Br. 6-9) seems designed to convey the impression that the actions taken by International and Local 8 were justified as part of a revolt of the downtrodden serfs of Hawaii against the "Big Five" corporations which ruled the Islands, and as an effort to preserve the economic well-being of thousands of longshoremen in Portland, Oregon; and that in any event the riot, which destroyed Hapco's property and injured its employees, was only a "completely spontaneous" and sudden flareup and should not be allowed to confuse the picture.

Appellants' statement is not in accord with the facts and does not find support in the record in this case. The references to the claimed nature of the Hawaiian strike and Hapco's relation to it are not based upon testimony relating thereto given at the trial but are based upon charges which Meehan made prior to the riot in talking to a newspaperman (Tr. 537).

As to Hapco's reason for chartering the barge (Br. 7), it had orders for 68,300 cases of pineapple from processors of fresh fruit in California and required pineapple at its own plant in San Jose and was prevented by the Hawaiian strike from using an ocean freighter (Exhibit 188, Tr. 912-913, 1018). Appellants mis-state the evidence when they say Hapco's orders from its customers contained strike clauses. There is no such evidence. Appellants' record citations refer to such clauses in agreements of Hapco's San Jose plant to buy fresh fruit from California

growers and do not relate to the pineapple on the barge.

As to the barge going to the Port of The Dalles (Br. 7), the evidence shows that after unloading was impossible in the San Francisco Bay area and in Tacoma due to the ILWU, Hapco sought out a port where the ILWU did not operate (Tr. 1020-1024). The Port of The Dalles was an open port without contracts with anyone (Tr. 478). Appellants' statements as to the facilities of the Port are not verified by their Tr. 544 and 545 references. As a matter of fact, river vessels and barges regularly loaded and discharged at the Port dock where railroad cars were available; and the Port had employees that did cargo work (Tr. 474-475).[6]

As to the unloading of the barge by the Port being an "obvious threat to the economic well-being" of thousands of skilled longshoremen (Br. 8), appellants cite no evidence in the record. This is a specious claim on the part of appellants, and the evidence proving this is marshalled in point III C, infra.

Finally, appellants' spontaneous combustion theory of the riot (Br. 8) simply ignores all the evidence previously summarized herein and in our Brief in the cross-appeal as to the events leading up to the riot. Appellants' theory was well disposed of by the District Court, when it stated:

> "I am not going to instruct that when you gather 300 men in one spot under these circumstances you can then claim it was a result of a flash of temper" (Tr. 1452).

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[6]Various pictures of the facilities of the Port are shown in Exhibits 69, 70 and 71.

ARGUMENT

I.

The District Court Did Not Err in Instructing the Jury on, and in Submittting to Them, the Issues of Whether Certain Agents and Representatives of International and Local 8 Performed Any Acts Charged and, If So, Whether They Were So Authorized or Ratified as to Be Binding on International and Local 8. (Answer to Specification of Error 1)

In accordance with Section 301 (b) of the Act that a labor organization "shall be bound by the acts of its agents," the District Court instructed the jury at length on the applicable law of agency (Tr. 1418, 1432-1434), specifically charging that Hapco was "required to prove the existence of an agency relationship as to each officer or agent involved and the existence and extent of the authority" (Tr. 1433).[7]

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[7]Section 301 (e) of the Act, which like Section 301 (b) noted above, is made applicable by Section 303 (b) to damage suits thereunder, provides that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Senator Taft, the author of the Act, explained the language of Section 301 (e), which was inserted by the Joint Conference Committee of House and Senate in H. Rept. No. 510, 80th Cong., 1st Sess., was intended to restore "the law of agency as it had been developed at common law" and illustrated his statement by stating "union business agents or stewards, acting in their capacity as union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." 93 Cong. Rec. 6859 (June 12, 1947).

As part of its instructions, the District Court stated:

> "The evidence shows that during the time covered by the controversy Louis Goldblatt was an officer and Matt Meehan, William Gettings, Henry Schmidt and Howard Bodine were agents and representatives of the Defendant International, and that Robert Baker and Wilfred Mackey were officers, and that Toby Christiansen and Matt Meehan [1721] were agents and representatives of Defendant Local 8. *It is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, or in entertaining any objects or purposes, if you find that such acts were committed or that such objects were entertained, was within the scope of their employment.*" (Emphasis supplied) (Tr. 1432)

Appellants objected to the first sentence of this instruction and have made it their Specification of Error 1A herein, on the specific grounds that Meehan, Gettings, and Schmidt were employees and not agents of International, that Bodine was not even an employee, and that the question of whether these individuals were agents was for the jury (Tr. 1462). It should be noted and it is significant that the appellants in their brief (Br. 10, 21) have omitted the last sentence of this particular charge, where the Court submitted to the jury the questions of not only whether the named individuals had committed or assisted in the commission of any of the acts charged, but also whether such acts were within the scope of their employment as agents.

Appellants have also objected and made it their Specification of Error 1B herein to the failure of the District Court to give their proposed instructions No. 7, 28, 33, 37 and 38 relating to agency matters.

The flaw running throughout appellants' argument is that they have failed to distinguish between the relationship of Meehan, Gettings and other individuals to International or Local 8, on which the evidence is undisputed, and the authority of these individuals to bind International or Local 8 by their actions, on which the evidence is disputed and was accordingly submitted to the jury. Much of appellants' argument is directed towards showing that any acts by the individuals involved would not have been binding on either union, but this is a question of whether these individuals acted within the scope of their authority and it was specifically left to the jury by the Court's instructions.

A. The Named Individuals were Undisputedly Agents and Representatives.

In objecting to the instructions of the District Court, appellants excepted specifically only to the naming of Meehan, Gettings, Bodine and Schmidt as agents and representatives of International (Tr. 1462). No objections were taken to the listing of Goldblatt as an officer of International, of Baker and Mackey as officers of Local 8, and of Christiansen and Meehan as agents of Local 8; and no argument is made in appellants' brief with respect to so listing these individuals.

The District Court named Meehan, Gettings, Bodine and Schmidt as agents and representatives of International, because, as it has stated, the evidence showed "without cavil" they were so, and there was "no evidence to the contrary" or "no attempt to prove the opposite" (Tr. 167). There was thus no question of fact to

be submitted to the jury as to the representative status of these individuals. cf. Small Company v. Lamborn & Co., 267 U.S. 248, 254 (1925); 53 Am. Jur. 153, Trial, Sec. 177.

With respect to Meehan, it was admitted by appellants in the Pretrial Order that at all times involved in this case Meehan was a paid employee of International assigned to work in Oregon (Tr. 51).

The record shows that at all times Meehan was the "representative" of International (Tr. 477, 759, 760, 813, 869, 1250-1251, 1335). His specifically assigned and authorized duties included the rendering of assistance to any local union affiliated with International (Tr. 760, 800-802, 849, 1251-1252, 1322-1323, 1324, 1335-1336). Many of the acts taken by Meehan as the representative of International have previously been set out in our statement of the case, and are important in connection with the light they throw on the fact that at all times Meehan was not acting as an individual on his own behalf but was representing both International and Local 8. Even in the letter which International addressed to Meehan two months after the riot in which they purported to describe his authority (Tr. 1215-1217), it is made clear that his authority and duties included the rendering of assistance to local unions upon their request and the implementing of International policies.

With respect to Gettings, the evidence showed that he was the Northwest Director of International with jurisdiction over the territories of Oregon, Washington, British Columbia and Alaska, whose duties included the

execution of policies made by the Executive Board of International (Tr. 700-702). It was Gettings who initially dealt with Schmidt, the International representative in Hawaii, with respect to preventing the pineapple barge from being unloaded in the Northwest (Exhibits 1, 2, 3 and 4; Tr. 703-704); and it was Gettings who contacted the International Longshoremen's Association and other unions with respect to the barge, who acted as the spokesman for the ILWU in dealing with the press in Seattle about it, and who kept in touch with the headquarters of International in San Francisco and with Meehan and with Mackey, the Secretary-Treasurer of Local 8, concerning it (Exhibit 5; Tr. 491-495, 707-708, 711-712, 732-735, 1358-1359).

The record also shows that Schmidt was the representative of, and organizer for, International in Hawaii (Tr. 703-704) and hence occupied the same position and had the same duties as Meehan. It was Schmidt who initiated the entire boycott of Hapco and his status is clearly reflected in his communications to Gettings (Exhibits 1 to 5, inc.). Bodine was an International representative on the Coast Labor Relations Committee set up under the Pacific Coast Longshore Agreement, 1948-1951. His duties involved the settlement of disputes under the ILWU contract, and his office was at International's headquarters in San Francisco (Exhibit 21; Tr. 1300-1301). He held various conversations and was in communication with Meehan, Mackey and Gettings concerning action to be taken against the barge (Exhibits 5, 185; Tr. 773, 817, 1302-1304).

It thus appears from the record that the position of each of these individuals and their relationship to International was such that they were at all times persons who acted for and in the interests of International and were in fact agents. See Restatement of Agency, Sec. 1. Appellants, however, assert in their brief that there was a conflict of evidence with respect to the agency relationship of each of these individuals. An examination of the record references given by appellants to support their contention discloses that they do not in any respect support the position of the appellants and are material only on the issues of whether these individuals acted within the scope of their authority when they engaged in various activities.

Appellants say that there was evidence that Meehan represented only Local 8 (Br. 22), but the supporting record references (Tr. 1197-1198, 1335, 1336-1337, 1348) are to the testimony of Meehan and of Goldblatt, Secretary and Treasurer of International, in which Meehan testified he was occasionally called on in his capacity as International's representative to render specific assistance to local unions and Goldblatt stated that one of the duties of a representative of International was to assist local unions on specific problems. Thus, even where International's representative is assisting a local union, he is performing a part of his job as a representative of International. In view of Meehan's testimony that the scope of his employment included the rendering of aid and assistance to locals (Tr. 760, 800-802), his further testimony that he was acting for Local 8 at The Dalles

(Tr. 1348) does not raise any issue as to his being a representative of International in the first place, though certainly it does on the question of whether the scope of his authority was such that his actions in assisting Local 8 would bind International as well as Local 8.

Next, it is said (Br. 22) that there was evidence that showed International exercised no control over Meehan with respect to matters which occurred at The Dalles. Even if this were true — and there is an overwhelming mass of evidence that it is not (Tr. 732-734, 775, 1204-1206, 1213-1214, 1358-1359) — it does not help the appellants for it bears upon the question of whether Meehan was acting within the scope of his authority and not upon the question of whether Meehan's position was such that he was an agent.

As for Schmidt, appellants say (Br. 22) that the testimony of Gettings shows that he was not the agent of International with respect to the matters that occurred at The Dalles. This testimony (Tr. 704) was only to the effect that Schmidt was not an officer of the ILWU. As for Gettings, appellants assert (Br. 23) that his own testimony proves he was not an agent of International with respect to The Dalles incident, but the cited testimony (Tr. 700-704) was quite the opposite, for he stated that he was the Regional Director of the ILWU for the Northwest (Tr. 700) and that his duties included the carrying out of the policies of the leadership of International (Tr. 701).

In this state of the record, appellants then assert (Br. 24) that "no matter how conclusive the evidence, a fail-

ure to permit the jury to resolve the question requires a reversal", and cite United Brotherhood v. United States, 330 U.S. 395 (1947). That case was a criminal prosecution for a conspiracy to violate the Sherman Act, in which the Supreme Court held that the agency provisions in Section 6 of the Norris-LaGuardia Act were applicable. The Court pointed out that in a criminal case ". . . a judge may not direct a verdict of guilty no matter how conclusive the evidence" (330 U.S. at 408). The present case is not a criminal prosecution but a civil suit for damages and one in which the statutory test of agency was specifically designed to avoid any possible application of the United Brotherhood case.[8]

B. The Disputed Issues of Agency Were Submitted to the Jury.

The District Court positively required the jury to find that persons named by it were acting within the scope of their authority before the unions, or either of them, could be held responsible for any of their acts (Tr. 1432). Thus the Court aptly summarized many of its previously given

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[8]Thus Senator Taft, in his analysis of Sec. 301 (e), stated:

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters placed upon section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming such responsibility. The conferees agreed that the ordinary law of agency should apply to employer and union representatives." 93 Cong. Rec. 6859 (June 12, 1947)

and more detailed agency instructions when it charged the jury that "the question is one of fact, as far as this case is concerned, as to whether in the things he is proven to have done he was authorized, or that the matters fell within the general scope of his agency, or whether the International expressly ratified his acts thereafter with the intention to do so and with knowledge of the facts" (Tr. 1434).

Under the instructions of the Court, the entire issue of the responsibility of either or both unions, or the actions, if any, of any of the individuals named by the Court, was left to the jury to determine. Stating what the evidence unequivocally showed with respect to the relationship of each of these individuals to International or Local 8 in no way deprived the appellants of their unquestioned right to have a jury trial upon contested issues of fact.

To the contention of appellants that the jury might have found that it was the acts of Meehan, Gettings, Schmidt or Bodine which resulted in imputed liability to International (Br. 26, 27), we reply that this would not be due to the Court's naming them as agents and representatives of International, but rather it would have been the result of finding them to have engaged in prohibited acts and that the scope of their employment or later ratification was such as to make the union liable.

C. Appellants' Proposed Instructions Were Properly Refused.

Appellants' proposed instruction No. 7 (Tr. 1483-1484) was erroneous in that it set up a test of "prior authorization" for determining the responsibility of a prin-

cipal for an agent's acts. This was more in keeping with Section 6 of the Norris-LaGuardia Act rather than the common law principles of determining the liability of a union for the acts of its agent, incorporated in Sec. 301 (e) of the Act. Under common law principles the authority of an agent to bind his principal is not limited to prior authorization or subsequent ratification. 2 Am. Jur., Agency, Sec. 86 and 101, pp. 70, 82. The proposed instruction was also properly refused by the District Court as requiring a comment on the evidence with respect to the "humane motives" of International in helping out individuals in trouble (Tr. 1392).

Appellants' proposed instructions No. 28, 33 and 38 incorporate appellants' contention that Meehan was solely the agent of Local 8 and that the International was accordingly not liable for his actions. These requested instructions were not justified under the evidence, though they were in fact covered in instructions given to the jury. Thus the Court presented to the jury the issues of whether Meehan had engaged in any of the acts charged and, if so, whether they were within the course and scope of his employment. To determine this latter issue, the Court instructed that the jury was to consider whether "the acts were done when the official was pursuing the business of the union who was his particular principal" (Tr. 1432). Proposed instruction No. 33 also was improper in that it stated as a rule of law, rather than posing as a question of fact, whether Meehan could act for Local 8 without in any way binding International.

Appellants' proposed instruction No. 37 dealing with the right of International to limit Meehan's authority was covered by the Court when it charged that "the International at any time had the full right, ability, authority and power to limit the authority of any agent, even though he remained on the payroll of the International" and that "it also had the power to discharge him" (Tr. 1434).

D. The Juneau Spruce Case.

Agency matters involved in this case are strikingly similar to those resolved by this Court in International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corporation, 189 F. (2d) 177 (1951), aff'd 342 U.S. 237 (1952). A suit for damages under Sec. 303 (b) of the Act was brought against International and its local in Alaska for a violation of Sec. 303 (a) (4) (jurisdictional dispute). An issue in the case was whether International was responsible for the damages inflicted on the plaintiff by reason of the activities of its "International representative" in Alaska, one Albright. The trial court instructed the jury on agency much along the same lines as the District Court herein, in part stating:[9]

> "It is undisputed that Germain Bulcke, John Berry and the witness Vern Albright were, during the time covered by this controversy officers of International, hence they were agents. But it is for you to say, whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment."

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[9]Court's instruction to the jury No. 4, Transcript of Record, pp. 49-50, Appeal No. 12527. See also supplementary instructions No. 3 and 4, Transcript of Record, pp. 1101-1103.

In that case, too, International contended that Albright was not an officer but an employee of International. The plaintiff, like Hapco herein with respect to Meehan, maintained that it was part of Albright's duties as International's representative to assist the local union and when he was doing this he was acting as an agent of International and within the scope of his authority.[10] This Court affirmed a judgment for the Juneau Spruce Corporation and upheld the instructions of the Court to the jury. In its opinion, the Court noted that although Albright and Berry were referred to as officers rather than as employees, "we hardly see how this could be prejudicial *as they were in fact agents* and the Trial Court referred to them as officers only as a step to classifying them as agents". (Emphasis supplied) (189 F. (2d) 177 at 189).

Another case involving similar agency questions to the one at bar was recently decided by the Court of Appeals for the Eighth Circuit. United Electrical, Radio and Machine Workers v. Oliver Corp., 205 F. (2d) 376 (June 9, 1953). Suit was brought against a local union and an International union for breach of their contract by striking in violation of Sec. 301 (a) of the Act. According to the Court of Appeals, the evidence showed that one Hobbie was a representative of International union with the duty of assisting and advising locals in his district. In the discharge of the duties entrusted to him, Hobbie was viewed by the court as a representative of both the local

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[10]Brief of Appellee Juneau Spruce Corporation, p. 72, Appeal No. 12527.

and the International. The court upheld instructions to the jury that the issues of liability with respect to International were:

> "Whether Charles W. Hobbie induced or promoted the strike, and whether in so doing he was acting within the scope of his agency as an agent for the International union." (205 F. (2d) at 386)

We submit therefore that upon the basis of the evidence and the authorities the District Court properly submitted to the jury the only agency fact issues presented in this case, namely, whether the named individuals who were in fact agents of International or Local 8 engaged in any prohibited acts within the course and scope of their employment so as to bind the union which was his or their principal.

II.

The Verdict Against Appellant Unions is not Inconsistent (Answer to Specification of Error 7).

Appellants' argument (Br. 28-35) that there was inconsistency in the verdict against the unions but in favor of the individual defendants runs counter to the long established rule enunciated in many federal cases that logical consistency in verdicts is not required. Dunn v. U.S., 284 U.S. 390 (1932); Jayne v. Mason & Dixon Line, 124 F. (2d) 317 (CA 2, 1941); Telfian v. Sanford, 147 F. (2d) 945 (CA 5, 1945), cert. denied 325 U.S. 869; cf. Clark v. Langsburgh, 38 F. Supp. 729 (D.C. 1941), aff'd 127 F. (2d) 331 (CA D.C. 1942).

All that is legally necessary for a verdict is that it be sustained by the evidence. The verdict against the appel-

lant unions was supported by substantial evidence, as witness the concise summary thereof which the District Court has set forth in its opinion (Tr. 157-163).

Moreover, appellants' whole argument of inconsistency is based upon the false premise that "the liability of International and Local 8 can only derive from the liability of the individual defendants" (Br. 29), from which the unwarranted conclusion is drawn that since the individual defendants were exonerated the unions cannot be held liable.

The liability of the unions did not by any means necessarily depend upon the actions of any or all of the individuals who were actually charged as defendants. There were many individuals who were not named defendants but upon whose activities the jury might well have predicated the liability of the unions: the more than 100 other longshoremen, besides the individual defendants, who picketed the entrance to the Port dock and who went onto the dock to stage a riot (Tr. 433-434, 450-451, 506, 585); the Hawaiian picket, Fred Kamahoahoa, who was present in forestalling Hapco's attempted unloading at Tacoma and was later flown by International to The Dalles where he picketed from September 26th[11] on; and International's Gettings, Schmidt, Bodine and Goldblatt, whose participation has been previously noted. Hapco's case against the unions was not limited, as appellants suggest (Br. 28), to the events occurring during the relatively short time of the riot at The Dalles. As

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[11]See Exhibits 2, 184 (check No. 173), 185; Tr. 424-425, 709-710, 731, 894, 1295, 1303-1305, 1315, 1317, 1361-1362.

charged and proved, the gist of Hapco's case against the appellant unions was a continuing violation of Sec. 303 of the Act commencing prior to the arrival of the barge at The Dalles and ending approximately on October 31, 1949, more than a month after the violence at The Dalles (Tr. 57-63).

Even in the master and servant cases where a servant is exonerated but the master is held under the rule of respondeat superior, courts have always held that the verdict is not inconsistent where the alleged damage could have been caused by the acts of other servants or agents. Southeastern Greyhound Lines v. McCafferty, 169 F. (2) 1 (CA 6, 1948) cert. denied, 335 U.S. 861 (1948); Fish v. Southern Pacific Co., 173 Or. 294, 143 P. (2d) 917 (1943); Mid-Continent Petroleum Corp. v. Epley, Sup. Ct. Okla., 250 P. (2d) 861 (1952); Newman v. Fox West Coast Theatres, 86 Cal. App. (2d) 428, 194 P. (2d) 706 (1948); Annotation, 78 A.L.R. 365; Annotation, 54 L.R.A. 649; Compare: Dixie Ohio Express Co. v. Poston, 170 F. (2d) 466 (CA 5, 1948).

So, for example, Local 8 could have been bound by the acts of its members, other than those charged as defendants herein, whom it dispatched to picket at The Dalles on September 26, 27, 28 and 29, and again on October 20 to October 26 (Tr. 888-890); or by the assistance which it was asked to give and did give to the Hawaiian picket (footnote 11, supra); or by its subsequent conduct with respect to its members indicted for riot by posting their bail, paying their fines upon conviction and their wages for lost time, all of which could have been

construed as a ratification of their actions (Exhibit 184; Tr. 895, 1259-1260, 1318-1320).

Likewise, as charged by Hapco (Tr. 57), International could act and be bound through the agency of Local 8 in the acts of the latter's representatives. Brown v. Oil Worker's International Union, 80 F. Supp. 708 (N.D. Calif., 1948); Smith v. International Printing Pressmen, 145 Tex. 399, 198 S.W. (2d) 729 (1946). International could similarly be bound by the acts of Local 8 for which the latter was responsible by reason of having been a "conspirator" with Local 8, as contended by Hapco (Tr. 57). The jury could have also found that International had ratified the actions of Local 8 and its various members at The Dalles from evidence as to the funds collected by or through International and disbursed to Local 8 for the expenses it incurred in connection with the barge.

There could not, in any event, be any inconsistency between the verdict as to the unions and the individual defendants because, as submitted by the District Court to the jury, the liability of the unions and of the individuals depended upon different findings of fact. The District Court has itself clearly recognized this fact in rejecting appellants' claim of inconsistency, stating:

> "Here the charge involving the individuals is a conspiracy to effect unlawful acts. The individuals may have done or assisted in doing the acts; the unions may have been found to have done the acts and thereby have incurred responsibility; but the mere fact that certain individuals who may have done certain acts were not found to have entered into a conspiracy with the union to do them is of

> no consequence. The liability would have been on entirely different grounds. . . . *the Court placed a somewhat greater burden upon Pineapple as to these individuals. Since there was a greater degree of proof required as to the individuals than as to the unions, there can be no inconsistency in the diverse findings.*" (Tr. 163-165). (Emphasis supplied)

The liability of appellant unions was submitted to the jury on the basis of whether either or both of them had violated Sec. 303 (a) (1) of the Act (Tr. 1415, 1418-1435). The jury was then instructed in substance that only if one or both of the unions were found liable under the Act could the liability of the individual defendants be considered (Tr. 1435, 1440) and that an individual defendant could only be found liable if he was a member of a conspiracy between either or both of the unions and the individual defendants (Tr. 1436-1437, 1438, 1440).[12] A different basis for determining the liability of the unions and individuals having been submitted to the jury, it was possible for them to return different verdicts which were not contradictory.

In apparent recognition of the different bases upon which the liability of the unions and the individual defendants was submitted, appellants suggest (Br. 33-35) that the "conspiracy" required of the individuals was only

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[12]In Hapco's cross-appeal as to the verdict in favor of individual defendants, it is contended that the District Court erred in failing to submit to the jury the issue of the common law liability of the individual defendants for their unlawful acts causing damage to Hapco, separate and apart from the issue of their liability as co-conspirators with the unions. Had this been done, it is even clearer that there would be no basis for any claimed inconsistency in the verdict for the bases of liability of the unions and of the individuals would have been even more different.

a "concert of action" to do unlawful acts with the unions and that the jury's verdict meant it found no such concert of action. So, if the individual defendants didn't engage in such acts, say appellants, the unions couldn't be bound by them, and the verdict against the unions is inconsistent with the one for the individuals. The District Court, of course, did not give any such limited instructions on the nature of the "conspiracy" to which an individual had to belong in order to be liable (See Tr. 1435-1440). In addition it is clear that appellants' argument again rests on the same premise that the liability of the unions could only derive from the individual defendants, which as we have shown above, is not true.

III.

The District Court did not Err in Instructing the Jury Concerning the Labor-Management Relations Act, 1947.

A. The Instructions Considering Hapco as an "Employer" Under Sec. 303 (a) Were Proper, Because Hapco was not Involved in any Labor Dispute With Appellants (Answer to Specification of Error 4A and 4C).

1. Appellants' Objections.

The District Court instructed the jury, in part, that Hapco would be entitled to recover if the jury found that one or both appellants induced or encouraged the employees of Hapco to engage in a concerted refusal in the course of their employment to perform any services in connection with the cargo of pineapple, with the object of forcing or requiring Hapco to cease doing business with certain specified persons and that as a result thereof

Hapco sustained damage to its business or property (Tr. 1424-1425).

Appellants objected to this instruction and raise it herein as their Specification of Error 4A, on the specific ground that Hapco could not be deemed an "employer" whose employees were induced to engage in a concerted refusal because Hapco was the "primary employer" and Sec. 303 of the Act does not apply to the inducing of employees of the "primary employer" (Tr. 1454-1455).

In a similar vein, appellants objected to the failure of the Court to give their requested instruction No. 29[13] and have made it their Specification of Error 4C herein, on the ground that there was "evidence from which the jury could find that this was a primary boycott against a corporation [Hapco] which was so intimately connected with those that were involved in the strike in Hawaii that the jury would have a right to find that this was a primary boycott" (Tr. 1453).[14]

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[13]Appellants' proposed instruction No. 29 provided:

"If you find that there was a primary strike against Castle and Cook and that Castle and Cook owns and controls the Hawaiian Pineapple Company to such an extent as to dominate its business practices and policies, then I instruct you, that you may consider Castle and Cook as the primary plaintiff herein. If you should so find then I further instruct you, that the strike or boycott in this case is a primary strike or boycott and you may not award any damages against the defendant, save and except for the actual destruction of property or personal injuries sustained."

[14]In Specification of Error 4C, appellants also object to the failure of the Court to give their proposed instruction No. 30 (Tr. 1487) that the Hawaiian strike was a "lawful strike, not in violation of any law of the United States or of Hawaii" and that trade unions were favored by public policy of the United States. Appellants did not make any specific objections on this ground as required by Rule 51 of the Federal Rules of Civil Procedure, to the actual in-

2. No Labor Dispute Between Hapco and Appellants.

The short and complete answer to the contention that Hapco was itself the "primary employer" with respect to International and Local 8 is that there is no such evidence in the record.[15]

Neither International, Local 8 nor the Hawaiian Local affiliated with International had any direct relationship or connection, by employment or otherwise, with Hapco or with Isleways. Admittedly Local 8 and the Hawaiian Local, whose activities extended only to representing longshoremen in Oregon and in Hawaii, respectively, had nothing whatsoever to do with the wages, working conditions or representation of the employees of Hapco and Isleways; and there is no evidence that International had any contact with these companies or made any demands upon them. Hapco's employees were represented by a cannery and plantation workers local affiliated with the ILWU; Isleways' employees were not represented by any union (Tr. 1015).

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structions given by the Court. In any event, the Court did instruct that trade unions were favored (Tr. 1418) and had previously indicated, prior to instructing the jury, that it would not instruct them that the Hawaiian strike was lawful for the reason that there was no such evidence in the case (Tr. 1399, 1401).

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[15]In their brief (Br. 43-54) appellants constantly use, but always keep away from defining, terms such as "primary employer", "primary labor dispute", "primary activity". Our understanding of the term "primary employer" is the person with whom the union (usually representing his employees) has a basic dispute over wages and working conditions. See Dennis, The Boycott under the Taft-Hartley Act, NYU Third Annual Conference on Labor (1950), 367, 388.

At no time involved in this case (from August to November 1949) was Hapco or Isleways engaged, either in Hawaii or in this country, in any controversy or labor dispute of any kind with their own employees (Tr. 1015-1017). It is also a matter of record that there was no picketing or any labor disturbance of any kind in connection with the loading and dispatch of Hapco's barge in Hawaii (Tr. 1017), even though it was developed at the trial that International and the Hawaiian Local knew of the loading and of Hapco's future plans for the barge (Exhibit 1).

The only connection shown in the evidence between the appellants and Hapco was the attempt of the unions to prevent the barge from being unloaded in the United States after its departure from Hawaii. Such a connection is hardly sufficient to transform Hapco, the object of the boycott, from an employer with no relationship whatsoever to the boycotting unions into a "primary employer" against whom it is said such tactics may be used with impunity.

Perhaps in recognition of the absence of any evidence in the record of a legitimate labor dispute between the appellant unions and Hapco, the novel assertion is now put forward for the first time in appellants' brief (Br. 45) that the activities which the unions took against Hapco at The Dalles were "primary" activities, because Local 8 was concerned as to who would unload the barge, which was not clear at that time.

Appellants' lack of any record citation reflects the fact that there is no evidence to back this assertion. There

is no evidence or intimation in the record that the actual work of unloading the pineapple from the barge was ever to be done by anyone except the Port of The Dalles and its employees (Tr. 474,, 475-477). At that time there was no doubt in the minds of the appellant unions on this point, for it was only the Port of The Dalles, not Hapco, that they approached and then only, as the Commissioners of the Port of The Dalles testified, to prevent the barge from being unloaded by the Port (Tr. 477-485, 500-505). The doubt as to which employees would do the unloading work, which appellants now express in their brief so as to build up the claim of a purported primary dispute with Hapco, was never shared by the representatives of International and Local 8 at The Dalles, for there is no record of their ever having contacted Hapco with a request that they be allowed to do the work of unloading the barge at The Dalles or to discuss wages and working conditions in connection therewith.

3. No Evidence That Hapco Was Connected With Hawaiian Strike.

As to appellants' other contention that their activities against Hapco were justified as "primary activities" because Hapco was so "intimately connected" with Castle & Cook with whom International and its Hawaiian Local were allegedly engaged in a strike in Hawaii (Br. 49-54), there is once again no evidence to support this constantly repeated but never proved charge.

A summary of the evidence on this point shows that Botley, Hapco's manager of its Engineering & Plant Division and Isleways' president, testified as a witness for

Hapco that the Hawaiian strike was between the longshoremen and the stevedoring companies of McCabe, Martin & Renney and Castle & Cook Terminals, Ltd. (Tr. 1017-1018). Appellants did not call any of their own witnesses on this point but were content with cross examining Botley and then calling him as an adverse witness. Botley's further testimony was that Castle & Cook Terminals was a subsidiary company of Castle & Cook (Tr. 1072), that he had no information if Castle & Cook Terminals was owned by Castle & Cook but that it "possibly" was (Tr. 1072), that Castle & Cook owned approximately 15 2/3 per cent of Hapco (Tr. 1073), that Castle & Cook owned approximately 26 per cent of the Helemano Company which owned approximately 33 1/3 per cent of Hapco (Tr. 1074), that the president of Castle & Cook was a vice-president of Hapco, and the president of Hapco was a director of Castle & Cook (Tr. 1073-1074).

At this point appellants sought to introduce in evidence their Exhibit 219, a manual of Hawaiian securities, which Botley was only able to identify as being used by investors. The Court sustained an objection to the exhibit on the basis that there was no proof of the authenticity of the information contained therein (Tr. 1168-1172). Thereafter, in a long colloquy with the District Court, appellants' counsel kept repeating that he could prove through Botley and Exhibit 219 that through interlocking directorates and stock ownership, Hapco was actually the "other hand" of Castle & Cook "to the end that it is actually a primary strike so far as Hawaiian Pineapple is concerned" (Tr. 1172-1177).

When appellants' counsel asked that his statements be taken as a complete offer of proof that Castle & Cook were "alter egos", the Court refused to accept this offer and instructed him to submit any offer of proof he wished. Exhibit 219 was then again offered in evidence and refused on the twin grounds that it was incompetent and that it was not a publication which was admissible in evidence (Tr. 1177-1178). Appellants then made no effort to elicit any further testimony from Botley nor did they call any other witnesses or introduce any other evidence on this subject.

Appellants have not assigned as error the refusal to admit Exhibit 219. Instead, to support their argument that Hapco was the "alter ego" of Castle & Cook, appellants' brief (Br. 50-53) cites as evidence press statements made prior to the riot by Meehan to the editor of a small weekly newspaper in The Dalles, in which Meehan said that Hapco was controlled by Castle & Cook and other members of the "Big Five" (Tr. 537, 541).

Propaganda mouthed by appellants' strike leader at The Dalles in his bid to keep the barge from being unloaded is thus later resorted to and cited as proof of the truth of the propaganda itself: Hapco and Castle & Cook are "alter egos" because Meehan said they were.

Appellants' proof reduces itself down to the mere fact that Castle & Cook had less than a majority stock ownership in Hapco. This does not make Hapco the alter ego or instrumentality of Castle & Cook even in labor relations matters. See Press Company, Inc., v. NLRB, 118 F. (2d) 937 (CA D.C. 1940), cert. denied 313

U.S. 595 (1941). The record is barren of any evidence that the actions of Hapco were in any way whatsoever governed by Castle & Cook or that the latter ever exercised any control over Hapco or had any connection with the cargo of pineapple. Moreover, no matter what the relationship between Castle & Cook and Hapco, there is no evidence of Castle & Cook being involved in any lawful prior dispute with appellant unions.[16] Hence, there is no justification for even the Hawaiian Local, let alone International and Local 8, to picket an employer and his product with whom it had no dispute. As the District Court stated in its opinion:

> "The Court rejected an offer to prove the claimed relation between Castle & Cook and Pineapple for, even if the claim be conceded, it gave neither the member of the Hawaiian local nor the unions here involved standing. International, according to its own reiterated position, had no authority over the Hawaiian local, and the Portland local, which is approximately twenty-five hundred miles away, had no ground to boycott a product with which it had no connection by employment or handling against an employer with whom none had had any relation. No decided controversy, whether by administrative board or court, holds there is any basis for protected concerted action upon the facts claimed here." (Tr. 171-174)

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[16]To fill this gap, appellants' Brief (p. 51, footnote 16) asserts that the lawfulness of the Hawaiian strike was to be presumed in the absence of evidence to the contrary offered by Hapco. This is incorrect. Hapco in its case in chief established a prima facia case that the appellant unions had violated Section 303 (a) of the Act and that neither International nor Local 8 had any direct relationship with it. If appellants wished to justify their activities as part of a lawful primary dispute in Hawaii, it was up to them to prove the nature and legality of this dispute.

Since there was no evidence in the record sufficient to even raise a question of fact as to the claimed relationship between Hapco and Castle & Cook and the effect thereof, there was no issue to be submitted to the jury in this connection. Accordingly, the Court properly refused to give appellants' proposed instruction No. 29.

B. The Instructions Concerning Appellants' Talks to Hapco's Truck Drivers Were Proper, Because Such Conversations Were not Privileged Under Section 8 (c). (Answer to Specification of Error 3 and 4B)

1. Appellants' Objections

The testimony showed that Baker, Local 8's President, had, prior to the riot on September 28, dispatched a patrol of four longshoremen from Local 8 to head off two of Hapco's large trucks outside The Dalles and to persuade Hapco's employees not to drive these trucks to the Port dock to pick up the cargo of pineapple for transportation to California (Tr. 677-680, 1098-1099, 1119, 1121-1122, 1125-1126, 1136 1140-1141, 1143). One of Hapco's drivers testified that the longshoremen "told us they couldn't guarantee us safe conduct" through their picket line and they "told me there was strike conditions" (Tr. 678); and one of the team of longshoremen admitted that he had told Hapco's drivers "not to go through the picket line if they were good union men" (Tr. 1143).

After advising the jury in detail of the various elements which they would have to find in order for the appellant unions to have violated Section 303 (a) (Tr. 1418-1421, 1424-1426), the Court instructed that the

jury might consider whether the conversations between the longshoremen and Hapco's truck drivers were for the purpose of inducing or encouraging Hapco's employees to take concerted action in the course of their employment to refuse to perform any services as to the pineapple, and whether it was an object of any inducement or encouragement, which they might find, to force any person to cease dealing with Hapco (Tr. 1427). The Court further instructed that these conversations should be so considered whether the longshoremen advised Hapco's drivers that the pineapple was "hot" or that the Port was threatening the working conditions and wages of the Portland longshoremen.

Appellants objected to this instruction and have made it their specification of Error 4B herein, on the ground that the longshoremen had a right under Section 8 (c)[17] to tell Hapco's drivers that the Port was threatening their working conditions and to ask them not to go into the Port (Tr. 1459).

In the same vein appellants objected to and have assigned as their Specification of Error 3 herein the failure of the Court to give their proposed instructions No. 45, 46 and 47, upon the ground that they were squarely based on Section 8 (c) of the Act (Tr. 1455-1456).

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[17]Section 8 (c) of the National Labor Relations Act, as amended, provides:

> "(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

2. Prohibited Conduct Under Section 303 (a) Not Privileged Under Section 8 (c).

Initially appellants' objections overlook the fact that Section 8 (c) by its very language is limited to an "unfair labor practice" under "the Act", which means "The National Labor Relations Act" (Section 17). There is not here involved an "unfair labor practice" proceeding, which is limited to and always involves proceedings before the National Labor Relations Board and subsequent court action thereon. On the contrary, this is a suit for damages under Section 303. There is no provision comparable to Section 8 (c) purporting to qualify Section 303 (a), although the language of Section 303 (a) substantially duplicates the unfair labor practices of Section 8 (b) (4). See United Brotherhood of Carpenters (Wadsworth Building, Inc.), 81 NLRB 802 (1949). A suit for damages under Section 303 of Title III of the Labor-Management Relations Act, 1947, is not controlled by substantive or procedural provisions of Section 8 (c) of Title I (the revision of the National Labor Relations Act).

Moreover, Section 8 (c) is not applicable, even in a National Labor Relations Board proceedings under Title I, to communications containing "a threat of reprisal or force or promise of benefit". The statements made by the team of longshoremen were of this nature. Urging Hapco's employees, who were themselves union members (Tr. 661, 677-678) not to go through a picket line which then numbered 200 to 300 longshoremen (Tr. 433-434, 506, 585), and telling them that their "safe conduct" could not be guaranteed, was both a promise of benefit and a threat of reprisal. As this Court said of Section 8 (c) in

Printing Specialties, etc. Union v. LeBaron, 171 F. (2d) 331 at 334 (1948) cert. dismissed, 336 U.S. 949 (1949):

> "The section is inapplicable. Cf. United Brotherhood of Carpenters & Joiners of America v. Sperry, 10 Cir., 170 F. 2d 863 (decided November 2, 1948). It is known to all the world that picketing may comprehend something other than a mere expression of views, argument or opinion. As conducted here it constituted an appeal for solidarity of a nature implying both a promise of benefit and a threat of reprisal. The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

Even if it be assumed that Section 8 (c) is applicable to a private suit for damages under Section 303, it is now established that the privileges granted in Section 8 (c) are subject to the prohibitions of Section 8 (b) (4) (the comparable section in Title I to Section 303 in Title III) and that the general language of Section 8 (c) must give way to the specific prohibitions of Section 8 (b) (4). NLRB v. United Brotherhood of Carpenters & Joiners of America, 184 F. (2d) 60 (CA 10, 1950), cert. denied, 341 U.S. 947 (1951); International Brotherhood of Electrical Workers, Local 501 v. NLRB, 341 U.S. 694, 704, 705 (1951).

The specific prohibitions of Section 303 (a) are, in part, that a labor organization shall not "induce or encourage the employees of any employer" to engage in specified action with a specified object in so doing. The words "induce or encourage" have been construed by the Supreme Court to be "broad enough to include in them every form of influence and persuasion". See International Brotherhood of Electrical Workers, Local 501 v. NLRB, supra,[18] where peaceful picketing by a union agent, who simply carried a placard which read: "This job is unfair to organized Labor: I.B.E.W. 501 A.F.L", was held to fall within the ban of inducing or encouraging.

The talks by the representatives of Local 8 to Hapco's employees were clear examples of inducement or encouragement within the purview of Section 303. As such, their legality was properly submitted to the jury by the court under its carefully circumscribed instructions containing all of the elements required by Section 303 (a).

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[18]The Supreme Court cited with approval the following definitions of "induce" and "encourage" from Webster's New International Dictionary, Unabridged (2d Ed. 1945):

"Induce: (1). To lead on; to influence; to prevail on; to move by persuasion or influence.

"Encourage: (1). To give courage to; to inspire with courage, spirit or hope, to raise the confidence of; to animate; hearten; * * *.

(2). To embolden, incite, or induce as by inspiration, recommendation, etc., hence, to advise; * * *.

(3). To give help or patronage to, as an industry; to foster;***."

C. Appellants Sham Claim of a Labor Dispute with the Port of The Dalles Does Not Justify or Affect Their Violation of Section 303 (a) (Answer to Appellants' Brief Argument IIIC and IIID).

While appellant unions did not and have not filed any appropriate specifications of error and have thus precluded themselves from claiming error in this Court, they now allege in their brief that there was a primary dispute between them and the Port of The Dalles (Br. 43-44) and that the Court failed to consider whether such a dispute existed and, if it did, its effect (Br. 45-49).

The record shows that the claim of the unions in this regard is a specious one contrived as an after-thought but that nonetheless the Court submitted it to the jury. Regardless, however, of any claimed dispute with the Port of The Dalles, the unions at the same time could under the law, and did by their activities, violate Section 303 (a) as against Hapco.

1. Specious Claim of Labor Dispute.

Appellants' brief carefully shies away from spelling out the nature of the alleged dispute with The Dalles (Br. 43-44). No claim is made that International or Local 8 wanted to organize or represent the employees at The Dalles. Nor is there a claim made that the unions wanted to have the work of unloading the barge assigned to them instead of to the employees of the Port. Instead, for the basis of the claimed dispute — hence the asserted justification for the unions' activities at The Dalles — we are referred to the testimony of Meehan made almost

two years later in Court to the effect that the Port was paying its employees lower wages and working longer hours than Portland longshoremen and was not observing a 2100-pound load limit (Br. 44).[19]

The speciousness of this claim is mirrored in the actual record of appellants' activities which shows that their true purpose was to boycott Hapco's cargo, and that the working conditions at the Port of The Dalles had nothing to do with their actions until it was necessary to later resort to them to escape the consequences of their earlier activities.

There was never any previous attempt made by International or Local 8, so far as the record shows, to interfere with the Port of The Dalles or its employees or their wages and working conditions in loading or unloading products at the Port dock from other barges. No mention was ever made at meetings between Meehan and Baker and the Port Commissioners before and after the arrival of the barge that International or Local 8 wanted to unload the barge or that the Port was threatening the wages

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[19]In another part of their brief, appellants state that their activities at The Dalles were "conducted in order to secure the unloading of the pineapple barge by union members." (Br. 61). If this was the purpose of the appellant unions, then their activities herein would also have violated Section 303 (a) (4) (jurisdictional dispute) in that an object thereof would have been to have the work of unloading assigned to them instead of to the employees of the Port to which it had been previously assigned. ILWU v. Juneau Spruce Corporation, 189 F. (2d) 177 (CA 9, 1951), aff'd 342 U.S. 237 (1952).
In its amended complaint and in the Pretrial Order, Hapco had previously alleged that the activities of International and Local 8 violated Section 303 (a) (4) (Tr. 45-49, 57-58), but this charge, although an issue in the case (Tr. 68), was not submitted by the Court to the jury.

and working conditions of the Portland longshoremen (Tr. 477-485, 500-505). Instead the Port was threatened as to what would happen if it did. When picketing of the barge commenced by members of Local 8 on September 26 and continued until the riot, the longshoremen carried no signs or banners claiming that the Port was unfair to them. Only the solitary picket from the Hawaiian Local wore an armband (Tr. 1257).

In various press interviews up to the time of the riot, Meehan said that the reason for the picketing was that the pineapple on the barge was "hot cargo" loaded by nonunion labor in the Hawaiian Islands and was an attempt to break the Hawaiian strike (Tr. 418-420, 520-521). Baker gave out similar press statements (Tr. 421-423).[20] The circulars (Exhibits 23, 24 and 25), signed "International Longshoremen's Warehousemen's Union" and distributed by Baker and other longshoremen (Tr. 535-536) before and after the riot dealt only with the Hawaiian strike and the "Big Five" who were trying to

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[20]It is interesting to contrast the reasons given by the representatives of International and Local 8 for their activities at The Dalles with the testimony of individual longshoremen as to their reasons for going from Portland to The Dalles. The reasons given and the number of longshoremen so testifying may be grouped as follows (Tr. 78-122):

1.	Fishing or for ride	14
2.	Curiosity—	
	(a) Plain curiosity	26
	(b) Plain curiosity (knew barge was "hot")	13
	(c) Curiosity as to wages and working conditions	9
	(d) Curiosity to see hiring hall	2
	(e) Curiosity to see who unloaded barge	6
3.	To get work (but did not offer to)	10
4.	To protect own interest	5
5.	To picket	7
6.	To keep from unloading	4

unload "scab pineapple" at The Dalles. No concern was expressed for the wages and working conditions at the Port. Nothing was said by the patrol of Local 8 members, who stopped Hapco's truck driver, about wages being paid by the Port (Tr. 679). Longshore pickets at the entrance to the Port dock, who stopped all vehicles entering the dock, asked whether the drivers had any connection with Hapco (Tr. 438-439, 548). During the riot on the Port dock staged by the longshoremen, they were shouting to each other not to touch Port property (Tr. 468). Sergeant U'Ren of the Oregon State Police, who was present all during the picketing before the riot, never heard any talk about the Port breaking the working conditions of the longshoremen (Tr. 458). At a conference held after the riot with the Governor of the State of Oregon on September 30, Baker labelled the barge as "hot cargo" and wanted to get it out of the state (Tr. 464-465). Even by then, appellants' present concern over the threat to their working conditions posed by the Port had apparently not materialized.

The first that was ever heard of a supposed dispute with the Port was in the middle of October when the NLRB advised Hapco that the unions had dropped their claim that the pineapple was "hot" and claimed that their dispute "was now" with the Port of The Dalles (Tr. 1042-1043). However, when unloading was thereafter commenced on October 19th, longshore pickets again appeared and were finally removed by an injunction (Tr. 1044-1046). As revealing as any of the above incidents was the refusal of Baker to testify whether Local 8 would

have unloaded the barge, even if the Port had entered into a contract with the unions (Tr. 1262-1264, 1284-1285).

Shining through all of the activities of appelling unions there can be clearly seen their specific objective: to prevent Hapco from unloading its cargo of pineapple in the United States. Their larger purpose in boycotting this cargo was to aid their strike in Hawaii. By preventing any shipping between the Islands and the United States with the consequent disruption of the economy of the Islands, tremendous pressure could be brought upon the employers in Hawaii with whom the Hawaiian Local was disputing. Appellants' true purpose is to be seen in the words of the International representative in Hawaii, who originated the boycott of Hapco's cargo (Exhibit 1), when he wrote under date of September 19: ". . . *the strike is still effective and it will remain so as long as . . . there is no resumption of operations between here and West Coast ports*" (Exhibit 3).

We submit that appellants' "pretended labor dispute [with the Port of The Dalles] was in truth the kind of a sham by which the Courts never permit themselves to be deceived nor the law to be perverted". Amalgamated Association, etc. v. Dixie Motor Coach Corp., 170 F. (2d) 902, 906 (CA 8, 1948). See also, Bakery Drivers Union v. Wagshal, 333 U.S. 437 (1948); Styles v. Local 760, International Brotherhood of Electrical Workers, 80 F. Supp. 199 (E.D. Tenn. 1948).

The District Court, which observed all of the witnesses during the long trial, has dismissed appellants'

claim of a labor dispute with the Port "as specious and not in accord with the facts" (Tr. 168), stating:

> "It stands out with naked clarity that International moved to boycott this cargo for the sole purpose of exerting pressure upon the public in Hawaii by isolating the islands from the continent. The record not only establishes the boycott and its purpose, but negatives all other reasonable postulates." (Tr. 168-169)

2. Claimed Dispute Submitted to Jury.

As specious as appellants' claim of a labor dispute was, the District Court nevertheless submitted it to the jury, specifically instructing them that a verdict should be returned for International and Local 8 if the jury found any inducement or encouragement by them "was solely for the purpose of concerted activity on account of wages, hours, or conditions of employment, as the defendants claim, or to obtain jobs for themselves" (Tr. 1429).

Thus the claim which appellants now assert was in fact submitted to the jury, and by its verdict it must have found that the activities of the unions were not for the purposes which they now say motivated them.

Far from placing "too heavy a burden on them" as appellants now complain (Br. 47), the word "solely" in the Court's instructions was absolutely necessary. For International or Local 8 to violate Section 303 (a), it was only necessary that one objective of the inducement and encouragement they engaged in was the prohibited one of forcing any person to cease doing business with any other person; and it did not make any difference if

their activities had any other legal objectives. NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 689 (1951); Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB, 341 U.S. 707, 713 (1951). In order for the unions to avoid the application of the Act to them by their claimed dispute with The Dalles, it was necessary that their sole purpose be one not prohibited by the Act.

3. Violation of Section 303 (a) Regardless of claimed dispute.

Appellants' notion throughout their brief seems to be that once given a dispute between them and the Port of The Dalles, a cloak of immunity was thereby thrown over their other activities directed against other employers and persons concerned with the unloading of the barge, these apparently being considered "secondary effects". We submit that the Act provides no such immunity and that, even if appellants' claimed dispute with the Port is assumed, it was still possible to simultaneously boycott Hapco in violation of Section 303 (a) (1).

The test of whether a union has violated Section 303 (a) (1) is always the same: Whether it has induced or encouraged the employees of any employer to engage in a concerted refusal in the course of their employment to perform any services, with at least one objective of the inducing and encouraging being that of requiring any person to cease doing business with any other person. The language of Section 303 (a) makes no reference to "primary" or "secondary" employers or activities; and we do not believe that the nomenclature test of calling a

union's activities "primary" or "secondary" is the touchstone for determining whether a union has violated this section. Joliet Contractors Association v. NLRB, 202 F. (2d) 606 (CA 7, 1953).

So, in the *Denver Building* case, supra, where a picket posted at a construction site where a union general contractor and a nonunion subcontractor were working caused the union employees to quit and eventually forced the general contractor to get rid of the subcontractor, the Court of Appeals for the District of Columbia (186 F. (2d) 326, 337 (1950) held that no violation of Section 8 (b) (4) (a) was involved because the union's activities were primary since they occurred at the site of the primary employer. The Supreme Court reversed the Court of Appeals, 341 U.S. 675, and held that the Act was violated, irrespective of the so-called primary nature of the dispute. The Court did not attempt to determine the legality of the union's actions in terms of primary or secondary activities but looked instead to the object of the union, saying (341 U.S. at 687):

> " . . . § 8 (b) (4) restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else."

The effect of the *Denver* case is that the activities of a union against its primary employer are not given a blanket of immunity because they are primary. Such activities can still violate the Act if an objective of these activities is one prohibited by the statute. This is even more forcibly brought out by two other Supreme Court decisions, International Brotherhood of Electrical Work-

ers, Local 501 v. NLRB, 341 U.S. 694 (1951), and Local 74, United Brotherhood of Carpenters & Joiners of America v. NLRB, supra, where peaceful picketing in primary disputes was again held illegal because of findings that the unions involved had an objective of forcing persons not directly involved in the dispute to cease doing business with another.

NLRB v. International Rice Milling Company, 341 U.S. 665 (1951) is not in any way inconsistent with these cases, for it was decided upon the basis that the activities of the union at the site of its primary dispute did not encourage concerted but rather stimulated individual action on the part of the employees of an employer not directly involved in a dispute. See NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 at 687. Nor does the *International Rice Milling case* immunize the conversation between the longshoremen from Local 8 and Hapco's truck drivers as appellants contend (Br. 46), for the question remains one of fact to be determined by the jury as to whether the conversations were inducements or encouragements to concerted action on the part of Hapco's employees.

We accordingly submit that under the language of the statute, and the decision of the Supreme Court, the determination of whether a union has violated Section 303 (a) is a fact question of whether it has engaged in prohibited action for a proscribed object; and it was on this basis that the District Court submitted the case to the jury in this case (Tr. 1418-1435). United Brick & Clay Workers v. Deena Artware Inc., 198 F. (2d) 637 (CA 6,

1952) cert. denied, 344 U.S. 897, rehearing denied, 344 U.S. 919 (1953). In that case an employer, engaged in a dispute with his employees, brought a suit for damages under Section 303 against a union which was picketing its plant and also an adjoining warehouse being constructed by a general contractor for the employer, which caused the employees of the general contractor to cease working. In affirming a judgment for damages for the employer, the Court of Appeals said (198 F. (2d) at 642):

> "It is well established by now that the right to strike under the National Labor Relations Act, Section 163, Title 29 U.S. Code, includes peaceful picketing by the striking employees of the employer's place of business, regardless of the damage to the employer's business resulting therefrom. N.L.R.B. v. Rice Milling Co., 341 U.S. 665, 671; N.L.R.B. v. Service Trade Chauffers, 191 Fed. (2d) 65, 67, C.A. 2nd. Such activity is generally referred to as 'primary' picketing. But the extension of such picketing for the purpose of exerting pressure on a neutral employer, generally referred to as 'secondary' picketing or boycott, was, under certain conditions, made unlawful by Section 303 (a) of the Labor-Management Relations Act of 1947. As pointed out in N.L.R.B. v. Service Trade Chauffeurs, supra, the difficulty lies in determining whether certain activity on the part of striking employees constitutes 'primary' or 'secondary' picketing. . . . If the picketing around the area of construction in the present case was by the Appellants and was for the purpose of forcing the general contractors to cease doing business with Deena, and accomplished that result, it was unlawful under Section 303 (a) (1) of the Act. If it was not by the Appellants or was not for that purpose, but was in substance merely a picketing of the place of business of the primary employer, it was not unlawful. We agree with the District Judge that the

evidence presented questions of fact for the jury. . . . In our opinion the evidence was sufficient to take the case to the jury on the issues of whether the picketing on the part of the Appellants was against Deena or against the general contractors and the purpose thereof. The charge of the District Judge properly presented these factual issues to the jury for its decision. The jury found for the Appellee."

D. The Instructions Concerning the Elements of Liability under Section 303 (a) were Proper (Answer to Appellants' Brief Argument 3E).

1. No Objections Taken to Instructions.

In their brief appellants assert for the first time that the instructions of the Court setting forth the various elements required to establish liability under Section 303 (a) (1) in terms of the evidence in the case, were erroneous in various respects (Br. 54-61). The contentions now asserted by appellants were not presented (with the exception noted below) to the District Court at the time the challenged instructions were given so that the Court might have had an opportunity to consider modifying its instructions.[21]

It is well settled that a party may not urge on an appeal an erroneous instruction unless he objected thereto at the time of trial and stated distinctly the grounds of his objection. Rule 51, Federal Rules of Civil Procedure; Novick v. Gouldsberry, 173 F. (2d) 496, 500 (CA 9, 1949); Barron & Holtzoff, Federal Practice and Procedure (Rules Ed., 1950), Vol. 2, Sections 1103 and 1104.

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[21]Appellants objected to considering the Union Pacific Railroad as a "person" under Section 303 (a) (Tr. 1456).

Under the present circumstances, we urge that appellants' failure to point out to the District Court the specific objections which they now wish to raise bars their review in this Court.

2. The Instructions Were Proper.

In any event the instructions given were proper. They strictly applied the language of Section 303 (a) (1) and required Hapco in order to recover to prove by a preponderance of the evidence that either International or Local 8, or both, (a) induced and encouraged (b) the employees of any employer (c) to engage in a concerted refusal in the course of their employment (d) to use, transport or otherwise handle any goods or to perform any services in connection with Hapco's cargo; and (e) that one of the objects of the inducement or encouragement was to force an employer or person to cease doing business with any other person, and that (f) it was injured as a direct and proximate result.

With respect to requirement (b) that prohibited inducement and encouragement by the unions must be directed against the "employees of any employer" there were present at The Dalles the employees of various employers engaged in unloading the barge and transporting the cargo therefrom by rail and truck to California, namely, those of Hapco, the Goodat Crane Company, the Union Pacific Railroad, the Port of The Dalles, and various trucking companies. Instead of combining all of these classes of employees of employers (except those of the Union Pacific and the Port of The Dalles which the Court excluded (Tr. 1420)) and presenting them in one

instruction to the jury, as Hapco did in its pretrial contentions,[22] the Court divided its instructions in this regard into two parts. In one part it considered the prohibited conduct of the unions against the employees of Hapco (Tr. 1424-1425), and in the other part against the employees of the trucking companies and Goodat (Tr. 1425-1426).

Appellants' first objection is that the first part of these instructions treats Hapco "as a secondary employer whose employees are induced to withhold their services in order to apply pressure upon the 'primary' employers", whereas appellants assert that they had no primary dispute with these latter employers (Br. 55).

Insofar as we can follow appellants' argument, it appears to be based upon a misinterpretation of the instruction and of the Act. The instruction does not treat the U.P., trucking companies, Goodat, etc., as primary employers but considers them as the "any other person" within the prohibited objective of Section 303 (a) (1) of "forcing or requiring . . . any employer or other person

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[22]In paragraph 6 of its contentions in the Pretrial Order, Hapco alleged, in part, that:
". . . the defendants engaged in and induced and encouraged the employees of employers engaged in unloading said barge and employees of employers engaged in transporting freight by rail and by truck between the states of Oregon and California to engage in a concerted refusal in the course of their employment to refuse to transport, handle or work on or perform any services in connection with plaintiff's cargo, with an object of forcing and requiring plaintiff and Isleways, Ltd. to cease doing business with said employers and with persons in the State of California to whom said cargo was being shipped, and other states, and of forcing and requiring said employers and persons to cease using, handling, transporting or otherwise dealing with plaintiff's pineapple and to cease doing business with plaintiff and with Isleways, Ltd." . . . (Tr. 57-58).

. . . to cease doing business *with any other person*". In effect, appellants' argument is that the "any other person" referred to in the statute can only be the so-called primary employer with whom the union claims a dispute. Section 303 (a) (1) has no such limitation in its language or in its purpose; and appellants' argument once again illustrates the difficulty of using primary and secondary activities as tests of liability. When prohibited conduct is directed against an employer who is not involved in an actual dispute for a purpose of forcing or requiring him to cease doing business with anyone, both the language and the purpose of the Act have been violated.

Appellants' other objection to the first part of these instructions is that the evidence fails to establish that Hapco was forced to cease doing business with the Union Pacific Railroad, Goodat and the trucking companies (Br. 56-58). The statute only requires that one object or purpose of the proscribed union action be the forcing or requiring a person to cease doing business with another person. The statute does not require that this object or purpose be realized. The evidence introduced by Hapco was more than sufficient to have submitted to the jury the question of fact of whether one object of the activities of International and Local 8 was to force Hapco to cease dealing with the following:

Union Pacific Railroad[23] — Botley, who was Hapco's

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[23]Appellants also contend (Br. 56), but without any reasons given therefore, that the Union Pacific Railroad was not a "person" with whom Hapco could be forced to cease doing business under Section 303 (a) (1). In Section 501 (3) of the Act, a "person" is defined to

official in charge of transporting the pineapple cargo from Hawaii to the Pacific Coast (Tr. 1014), testified that subsequent to making arrangements with the Port of The Dalles to unload the barge (Tr. 1024) he personally ordered railroad cars from the Union Pacific Railroad (Tr. 1035-1036). However, after the commencement of the picketing at The Dalles on September 26, Meehan testified that he contacted the various railroad brotherhood unions at The Dalles and asked them to respect the longshore picket line, and was told in reply that members of the railroad unions would not endanger any pickets on the track (Tr. 781-783). On September 28 at a time when there were 200 to 300 pickets before the entrance to the dock and other pickets at the switching facilities of the Union Pacific Railroad leading into the dock, the railroad cars which had been ordered came up to the pickets at the switching facilities, stopped, and then went back (Tr. 517-518, 892, 1037). All during the time that the Port of The Dalles was picketed in September and later in October, no railroad cars were brought into the Port terminal by the regular train crew, though several officials of the railroad later brought in and took out a number of railroad cars through the picket line (Tr. 1037-1038).

Goodat Crane Company — Hapco leased a crane and an operator from the Goodat Crane Service to lift pine-

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have the same meaning as when used in the National Labor Relations Act, as amended. In Section 2 (1) of the latter Act the term "person" is defined to include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers". The Union Pacific Railroad is within this definition. See International Rice Milling Co. v. NLRB, 183 F. (2d) 21, (CA 7, 1950), reversed on different grounds, 341 U.S. 665.

apple from the barge to the Port dock (Tr. 1040). When the leased crane was brought from Portland to The Dalles and was being assembled there by Goodat's two employees, a number of longshoremen came over from the entrance to the Port dock to tell Goodat's employees that they had better not take the crane out on the dock if they intended to unload some "hot pineapple" because it is "liable to melt the boom off and it won't be healthy for you" (Tr. 876, 879). When Goodat's employees, who were members of Local 701, Hoisting & Portable Engineers (Tr. 876), returned later to The Dalles they refused to go to work because of the longshore picket line (Tr. 882). Thereafter, when Goodat himself was threatened at his home by two men who identified themselves as "from the Hawaiian pineapple job" at The Dalles, he terminated the lease arrangement and Hapco was forced to buy the crane from him (Tr. 885-886, 1041).

Trucking companies — As well as talking to the various railroad unions, Meehan admitted that he contacted the Teamsters Union, members of which were employed as drivers by the various truck common carriers serving The Dalles, and received the assurance that the Teamsters would not order their men through the longshore picket line (Tr. 587, 780-782, 1009). Botley also testified that he ordered trucks from Consolidated Freightways, Portland-Pendleton Motor Freight Company, and Oregon-California-Nevada Fast Freight (Tr. 1034-1035). Consolidated Freightways supplied one truck which went onto the dock before the picket line was established (Tr. 1004). On September 28th when another Consolidated

Freightways truck came up to the picket line at the Port dock, the driver got out, went up to the picket line, and then turned around and left (Tr. 1036-1037). The Portland-Pendleton Motor Transport Company subsequent to the riot transported the pineapple from The Dalles to the Southern Pacific Railroad in Portland (Tr. 589-592).

Hapco's California customers — There was admitted in evidence orders placed with Hapco for 68,300 cases of pineapple from various fruit packers in California (Exhibit 188; Tr. 912). The pineapple on the barge was being shipped to these concerns in fulfillment of these orders (Tr. 1018-1019). As a result of appellants' activities, Hapco was prevented from making any deliveries on these orders (Tr. 916-918).

Appellants' next objection goes to the latter part of the Court's instructions, which vary from the first part in that for the required element of the "employee of any employer", the employees of Goodat and the trucking companies are substituted for Hapco's employees (Tr. 1425-1426). Appellants view this latter instruction as inconsistent with the former, in that it makes the trucking companies and Goodat secondary employers and Hapco the primary employer in reverse of their roles in the first part of the instruction. This is said to show that the District Court was having difficulty in determining who were primary and who were secondary employers (Br. 58-59). Again appellants have misconstrued the instructions and the Act. Under the evidence, Hapco, the trucking companies and Goodat were all employers who were not involved in any labor dispute with International

and Local 8 but whose employees were subjected to influence by the activities of appellant unions; and as such all were entitled to the protection of the Act.

Appellants' other objection to the latter portion of the instructions is that there is no evidence of a concerted refusal of the employees of Goodat. This is not in accord with the record reviewed above which shows that Goodat only had two employees and that both of them refused to perform any services in connection with the pineapple after being spoken to by a group of longshoremen and being faced with a picket line. In any event, the statute only requires that employees be induced or encouraged to engage in a concerted refusal, not that they must actually quit; and this is a question of fact to be determined by the jury, as it was in this case.

The *International Rice Milling Company* case, cited by appellants, does not stand for their claimed proposition (Br. 60) that no inducement or encouragement is shown by a person's refusal to cross a picket line.

Appellants' other assertion that there was no evidence of inducing or encouraging the employees of the trucking companies simply disregards Meehan's testimony concerning his contacting the Teamsters union to which the employees of these concerns belonged and the evidence or the effect of the longshore picket line upon these drivers.

E. Conclusion

Appellants' International and Local 8 had no legitimate labor dispute or connection with any of the persons at The Dalles concerned with the unloading of Hapco's

cargo of pineapple and transporting it on to California. Nonetheless, appellant unions proceeded by their various activities to expose all of these neutrals to union pressure and to subject them to economic loss — all for the immediate object of preventing the unloading of Hapco's pineapple and for the larger purpose of preventing any shipments whatsoever between Hawaii and the United States so as to generate public pressure in Hawaii and force the employers whom they were striking against to give in.

Section 303 of the Act was designed to provide redress for those sustaining damage to their property and business as a result of such unjustified wrongs and was properly applied by the District Court in presenting to the jury the issues to be determined by them.

IV.

The District Court Did Not Err in Instructing the Jury Concerning Hapco's Duty to Minimize Its Damages (Answer to Specification of Error 2).

Appellant unions objected to and have assigned as their Specification of Error 2 the following instructions which the District Court gave the jury on the duty of the appellee to minimize its damages:

> "In this case, if you do award damages, you must remember that it is the duty of plaintiff to minimize the damages as far as reasonably possible. Therefore, if you find that plaintiff is entitled to recover damages but that it could have reasonably, in the exercise of due diligence and fair business practices, have minimized the amount thereof by taking any measures suggested in the evidence, you are entitled to consider that factor in assessing damages." (Tr. 1441-1442)

The specific ground of appellants' objection was that the Court failed to detail the evidence showing the particular ways in which the appellants contended Hapco could have minimized its damages.[24]

The correctness of the District Court's instruction is not disputed,[25] but, instead, the specific objection is made that the Court should have amplified its instruction by singling out particular circumstances or evidence. Once it is acknowledged, however, that "the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion". United States v. Bayer, 331 U.S. 532, 536 (1947); Southern Pacific Co. v. Souza, 179 F. (2d) 691, 695 (CA 9, 1950).

As shown below, there was no evidence in this case which would have warranted the District Court in exercising its discretion to amplify its charge in the particulars requested by appellants. For it to have done so, we

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[24]It should be noted that the District Court had previously instructed the jury with respect to appellants' contentions:

> "Defendants contend plaintiff could have purchased ample pineapple from other sources without money loss and thereby minimized damages.
>
> Defendants contend that plaintiff could have refrained and refused to buy large quantities of fresh fruit in 1949 under its contracts to purchase fresh fruit from growers thereof without money loss and thereby minimize their damages." (Tr. 1424)

This was in accordance with appellants' contentions in the Pre-Trial Order (Tr. 65-66).

[25]Section 303 of the Act contains no provision with respect to any obligation of a person injured in his business or property by a union's illegal activity to minimize his resulting damages. In view of the wilful and intentional tort involved, it may well be that no such obligation arises. See Desimone v. Mutual Materials Co., 23 Wash. (2d) 876, 162 P. (2d) 808 (1945); Smith v. International Printing, etc., 145 Tex. 399, 198 S.W. (2d) 728 (1946); Runnells v. Village of Pentwater, 109 Mich. 512, 67 N.W. 558 (1896).

submit, would have been error. Southern Ry. v. Cunningham, 123 Ga. 90, 50 S.E. 979 (1905); Pelham & H. R. Co. v. Walker, 27 Ga. App. 398, 108 S.E. 814 (1921).

In their brief appellants assert various ways in which they believe Hapco failed to minimize its damages. Throughout their argument, however, appellants lose sight of the nature of the doctrine of mitigating damages, which only requires one injured by the wrongful acts of another to exercise reasonable care to minimize the resulting damage. 15 Am. Jur. 420, 424, Damages, Sections 27 and 28.[26] It is fundamental that the doctrine does not arise until, and is only applicable after, the wrong has been committted. St. Paul Fire and Marine Insurance Co. v. Bigger, 105 Kans. 311, 182 P. 184 (1919); Southwestern Gas and Elec. Co. v. Stanley, 45 S.W. (2d) 671, aff'd. 123 Tex. 157, 70 S.W. (2d) 413 (1934); City of Richmond v. Cheatwood, 130 Va. 76, 107 S.E. 830 (1921). It is equally established that a party is not bound to anticipate that a wrong will be committed against it. Rathborne, Hair & Ridgeway Co. v. Wiliams, 59 F. Supp. 1, 4 (E.D. S.C. 1945); Parkersburg Rig & Reel Co. v. Freed Oil & Gas Co., 111 Kans. 37, 205 P. 1020 (1922); City of Garrett v. Winterich, 44 Ind. App. 322, 87 N.E. 161 (1909); Carter Oil Co. v. Jackson, 194 Okl. 621, 153 P. (2d) 1013 (1944).

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[26]What is meant by the so-called duty to mitigate damages, said Chief Justice Cardozo, concurring in McClelland v. Climax Hosiery Mills, 252 N.W. 357, 169 N.E. 605 (1930) mod. 253 N.Y. 534, 171 N.E. 770, is merely that, if a plaintiff neglects to do what ordinary and reasonable prudence dictates to lessen the damages, he will not be heard to say that the loss properly chargeable to his own negligence is a jural consequence of the wrong. Such consequences are deemed not to flow directly and naturally from the wrongful act and are regarded as remote.

Appellants first suggest that Hapco failed to minimize its damages, because it bought fresh fruit in California through the summer of 1949 until September thereof for use with Hawaiian pineapple in making fruit cocktail, in the face of the strike of longshoremen in Hawaii and the resulting interruption of shipping from Hawaii (Br. 64-65).

The evidence shows that the purchases of fruit by Hapco at its San Jose, California, plant were made under written contracts which it had previously entered into with various fruit growers in California (Tr. 958-961). Although these contracts contained cancellation clauses which could be invoked "in the event of labor difficulties", a Hapco official from the San Jose plant testified that if Hapco had cancelled its fruit delivery purchase contracts with its suppliers, it would practically have wrecked its organization for future years' operations (Tr. 961). This witness also testified that as late as August 31, 1949, the San Jose plant was expecting delivery to it in California of the pineapple on the barge. This would have then been processed with the fresh fruit purchased under the contracts to make fruit cocktail (Tr. 964-965). The record thus makes apparent the reasonableness of Hapco's action in not cancelling its fruit contracts. But in any event, as a matter of law, Hapco was not bound to anticipate the wrongs which appellant unions were to inflict upon the pineapple barge and it had no duty to minimize until after the infliction of the damages.

Appellants next suggest that Hapco was unreasonable in failing to purchase non-Hawaiian grown pineapple

for use in producing fruit cocktail, or that failing this, Hapco could have canned the various fruits separately or as fruit mix and sold them under different labels.

Here again, appellants are asserting that Hapco should have anticipated the appellants' subsequent illegal activities against it, even though the evidence shows the reasonableness of what Hapco did prior to the commission of appellants' wrongs. Hawaiian pineapple is a uniquely high-grade product for which equal substitutes were not available in the summer of 1949. It was not possible to substitute Mexican, Cuban or Puerto Rican pineapple for Hawaiian pineapple because the fruit grown in the former countries was of far lower quality than Hapco's standards (Tr. 982-984). Having for many years spent thousands of dollars advertising its product, Hapco could not be expected to sacrifice the goodwill of its customers throughout the nation by using inferior fruit in its products. As for putting up "fruit mix" or separately canning different kinds of fresh fruit, Hapco's evidence was that the product known as "fruit mix" was unsalable in any quantity (Tr. 988-989), and that the San Jose plant was primarily a fruit cocktail plant and was not equipped with the facilities and techniques for separately canning fruits, such as peaches and pears (Tr. 976, 977-978). In fact the testimony was that the San Jose plant could have packed only a very small volume of the various fruits separately (Tr. 978).

In their final point appellants depart from the ground assigned by them in objecting to instructions of the Court as to minimizing damages. Instead they say that the

damages recovered by Hapco were in excess of what the evidence showed it was entited to. Appellants' contention is that 25% of Hapco's reprocessing costs were incurred from September 26 to 29, inclusive, which costs cannot be charged to appellants because the barge did not arrive in The Dalles until September 26 and therefore Hapco's reprocessing costs incurred on September 26, 27, 28 and 29 are not proper items of damage (Br. 66).

Appellants' point is not well taken. The pineapple barge arrived in The Dalles on September 24 (Tr. 1025, 1033) and not on September 26 as appellants say (Br. 66). Arrangements had been made to commence unloading it September 26 (Tr. 1041). Hapco's San Jose plant, which had been processing fresh fruit into fruit mix for approximately three weeks prior to September 26th to prevent its spoilage, expected to receive some of the pineapple by September 27 or 28 and had planned to hold up the further processing of fresh fruit into fruit mix from September 26 until the pineapple arrived (Tr. 936-938). Had the pineapple arrived as planned, the processing of the remaining fresh fruit on hand into fruit mix would not have been necessary. However, when the San Jose plant learned on September 26 and 27 of the difficulties of unloading the barge at The Dalles, it decided that it would have to go ahead and process the rest of the fresh fruit to keep it from spoiling; and from September 26 until October 6, it packed 138,388½ cases of fruit mix (Tr. 937-938). Inasmuch as there was no market for fruit mix (Tr. 938, 988-989, 995-996), Hapco was required to reprocess all of the fruit mix into fruit cock-

tail after the eventual receipt of the pineapple from the barge in November (Tr. 939, 941).

Hapco made no claim for the expenses it incurred in processing the fresh fruit into fruit mix prior to September 26. However, the expenses, which it incurred in reprocessing the fruit mix subsequent to that date upon which testimony was received (Tr. 938-939, 956-958, 990-991), were claimed by Hapco to be a damage to its business and property directly and proximately resulting from the unlawful activities of the appellant unions.

It was the burden of the appellant unions to prove that Hapco failed to reasonably mitigate its damages. 15 Am. Jur. 770, Damages, Sec. 331; Annotation, 134 A.L.R. 242, 279 ff; Standard Growers Exchange v. Hooks, 22 F. (2d) 599 (CA 5, 1927); Lerman v. Fruit Processers, Inc., 191 F. (2d) 349 (CA D.C. 1951), cert. denied 342 U.S. 877 (1951).

The evidence indicates that they failed to sustain this burden. In the last analysis, the question was one of fact for the jury to determine. 15 Am. Jur. 802, Damages, Sec. 363. The issue was presented to them on a correct statement of the law. The jury's verdict bespeaks their findings on this issue. This appellate Court is not the forum to relitigate this issue of fact.

The Trial Court, in commenting upon the appellants' contention that the verdict was too high because the jury gave no consideration to the minimization of damages,[27] said:

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[27]In the Pretrial Order, Hapco contended that it was entitled to damages of $234,280.29 (Tr. 61). The verdict in favor of Hapco was for the sum of $201,274.27 (Tr. 136).

"But the Court would have upheld a verdict in a much greater sum within the limits of the prayer of the complaint, if it had not been for an express disclaimer by Pineapple during the trial. The jury returned a lesser sum probably because they believed Pineapple would be satisfied to accept that amount. In view of the actions for which the unions were found liable, the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors. The Court agrees." (Tr. 166-167)

We submit that the Trial Court was correct in its estimate of appellants' argument.

CONCLUSION

A review of the record in this case shows that the verdict of the jury was supported by clear and convincing evidence that the appellant unions violated Section 303 (a) (1) of the Act and thereby damaged Hapco. No errors affecting the rights of appellant unions were made by the District Court. The judgment should therefore be affirmed.

Respectfully submitted,

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
Attorneys for Appellee
Hawaiian Pineapple Company, Ltd.